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U.S. District Court - Eastern District of California

Rashpal Singh Gill and Dalwinder Kaur dba
Livingston Grocery,

Plaintiffs

v.

United States Department of Agriculture,

Defendant.

Case No.

**Complaint for Declaratory Relief,
Injunctive Relief, and Attorneys' Fees and
Costs (Freedom of Information Act, 5
U.S.C. § 552 (a)(3)(A); (a)(4)(B), (E);
(a)(6)(A)) (Administrative Procedure Act,
5 U.S.C. §§701, et. seq.)**

Introduction

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., for injunctive and other appropriate relief, and seeking the expedited processing and release of agency records requested by plaintiffs from defendant United States Department of Agriculture.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(E)(iii), and 701 et. seq. The complainants reside within the jurisdiction of the U.S. District Court for the Eastern District of California, and the agency records are located in this district as well. 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. §§ 701-706.
3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) (suit may be brought in the District where a substantial part of the activities that are the subject of the action are situated) and 5 U.S.C. § 552(a)(4)(B) ("[T]he district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.").
4. Plaintiffs have exhausted all administrative appeals and remedies.
5. Pursuant to 5 U.S.C. § 552(a)(4)(B), this Court is authorized to grant injunctive relief ordering the USDA to produce documents responsive to the FOIA Request. An actual controversy exists between the parties within the meaning of 28 U.S.C. §

2201. Thus, this Court also may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.30.

Parties

6. Defendant United States Department of Agriculture (USDA) is a Department of the Executive Branch of the United States Government. USDA is an agency within the meaning of 5 U.S.C. § 552(f). The Food and Nutrition Service (FNS), formerly known as the Food and Consumer Service, administers the nutrition assistance programs of the U.S. Department of Agriculture. The USDA is ultimately responsible for the FNS's compliance with the FOIA.
7. Plaintiffs Rashpal Singh Gill and Dalwinder Kaur own and operate Livingston Grocery (collectively, "Plaintiffs" or "Livingston Grocery"), a retail store in Sacramento County, California. The store had participated in the USDA's Supplemental Nutrition Assistance Program until the USDA revoked its right to participate in 2012.

Statement of Facts

8. Plaintiffs had been a qualified retailer participating in the USDA's SNAP benefits program.
9. The USDA revoked Plaintiffs' participation in SNAP based upon alleged violations discovered by USDA investigators from November 2011 to April 2012.
10. Plaintiffs timely appealed the determination that they were ineligible to participate in SNAP.
11. A true and correct copy of the letters between the USDA and Plaintiffs evincing the preceding two paragraphs is attached to this complaint as Exhibit A and incorporated by reference.
12. On September 13, 2012, Plaintiffs filed a request ("FOIA Request") with the USDA for:

- 1) The basis for determining that Livingston Grocery violated SNAP regulations;
- 2) Estimates, factors, or variables used to determine the alleged violations;
- 3) The nature and scope of the violations that were allegedly committed by any personnel of Livingston Grocery;
- 4) The names, title, and contact information of those who undertook an investigation of Livingston Grocery for the alleged violations;
- 5) Copies of any reports or documents compiled by those who undertook the investigation of Livingston Grocery;
- 6) The names, title, and contact information of any witness who may be providing information or testimony of the alleged violations;
- 7) Copies of any statements made by these witnesses;
- 8) Copies of any statements made by agents of Livingston Grocery that you may possess;
- 9) Any prior action taken to warn Livingston Grocery about the possibility that violations are occurring;
- 10) Any evidence that has been compiled supporting these allegations;
- and,
- 11) Any other evidence that shows Livingston Grocery's intent to violate any regulation.

13. A true and correct copy of this FOIA request is attached to this complaint as Exhibit B and incorporated by reference.

14. The USDA responded on October 4, 2012. In that response, the USDA produced approximately 53 documents in full, withheld 65 documents in part, and withheld 52 in full. A true and correct copy of the USDA's response is attached to this complaint as Exhibit C and incorporated by reference.

1 15. On October 19, 2012, Plaintiffs appealed the USDA's FOIA determination in a
2 letter ("FOIA Appeal") to the FNS administrator at foia@fns.usda.gov.

3 16. On October 22, 2012, USDA employee Todd Walls acknowledged receipt of the
4 October 19 FOIA Appeal and stated, "Your request was received on October 19,
5 2012 and has been assigned the tracking number # 2013-FNS-00007-A."

6 17. FOIA requires an agency to respond to a FOIA appeal within 20 days.

7 18. No one from USDA contacted Plaintiffs about their FOIA Appeal from October
8 22 to November 1, 2012.

9 19. On November 1, 2012, Plaintiffs contacted the USDA again, writing to the USDA:
10 "Is there any progress on our appeal? (Case # 2013-FNS-00007-A). We need the
11 documents for an appeal of our own, and it's a pretty cut-and-dry case that these are
12 public records. Please let me know when we can expect the documents."

13 20. No one from USDA responded to the November 1 email.

14 21. On November 9, 2012, the 20-day deadline elapsed. USDA's response, if any,
15 would now fall outside the statutory timeline to respond.

16 22. On November 12, 2012, Plaintiffs again contacted the USDA, writing: "Todd
17 [Walls], I'm still waiting on this. It has been several weeks since I filed the appeal of
18 the FOIA request. Please provide an update as soon as possible. We are up against
19 a December 1st deadline to file our appeal, and we need this information
20 immediately."

21 23. On November 14, 2012, USDA FNS officer Jennifer Weatherly responded to
22 Plaintiffs: "We are currently still working your appeal. I have informed the
23 Administrative Review Officer that your client has an open appeal with our office.
24 We will keep you posted on the status."

25 24. Hearing no response from USDA for two weeks, Plaintiffs again wrote to the
26 USDA: "Any progress on Case # 2013-FNS-00007-A? Our deadline is tomorrow.
27 I understand that you have obtained a continuance from hearing officer Lorie
28 Conneen; I have written to her to confirm that, and I hope it is true. However, even

1 if our deadline has been extended, my clients are losing thousands of dollars per
 2 week thanks to their inability to accept SNAP benefits. We want to resolve this
 3 matter as quickly as possible. The SNAP revocation was conducted erroneously, as
 4 even a cursory review of the record will reveal. If we can just get the unredacted
 5 investigators' reports, we can put this to rest."

6 25. The USDA did not respond.

7 26. On December 5, 2012, Plaintiffs again wrote to the USDA. In this letter, Plaintiffs
 8 explained that the USDA was in violation of FOIA:

9 "I'm checking in again to see if you have released the records
 10 in Case #2013-FNS-00007-A.

11 Though we would prefer to resolve this without involving the
 12 courts, we are considering filing a lawsuit to enforce our
 13 rights under FOIA. I would note that a court "may assess
 14 against the United States reasonable attorney fees and other
 15 litigation costs reasonably incurred in any case . . . in which
 16 the complainant has substantially prevailed." 5 U.S.C. §
 552(a)(4)(E). Since there is no basis for withholding these
 records, we would prevail in such a suit. Courts will award
 fees to prevailing FOIA litigants after considering four
 factors, including:

17 (1) whether the public interest is served by disclosure,

18 (2) whether a commercial interest is served by disclosure,

19 (3) the nature of the plaintiff's interest in the records sought,
 20 and

21 (4) the reasonableness of the government's asserted legal
 22 basis for withholding the documents.

23 *Nationwide Building Maintenance v. Sampson*, 559 F.2d
 24 704 (D.C. Cir. 1977).

25 All of these are met here. These records are necessary to
 26 audit the accuracy of the reports (factor #1) and to preserve
 27 our client's ability to operate his commercial business
 28 (factors #2 and #3). The government's basis for withholding
 the results of the reports are frivolous for the reasons
 explained in our appeal (factor #4)."

1 27. USDA officer Jennifer Weatherly responded on December 6, 2012: "We
2 apologize with the delay in processing your appeal. Your appeal is currently with
3 our General Counsel. They provide a legal review for all USDA appeals which is a
4 large number and they can sometimes take longer to process. Once it is returned it
5 will be processed for final signature."

6 28. There is no statutory basis for a delay in releasing public information because of a
7 department's "large number" of FOIA requests that "can sometimes take longer to
8 process."

9 29. Plaintiffs again wrote to the USDA on December 10, 2012: "Do you have an
10 estimated date of when this would be completed? It's already been a couple
11 months; if we're talking another few months down the line, the delay could drive
12 my client's business into bankruptcy, and it would become cost effective for us to
13 get a judge to order your general counsel to release the documents."

14 30. The USDA did not respond for almost another month.

15 31. Finally, on January 9, 2013, the USDA responded: "Our General Law Division has
16 completed their review and it will now be processed for final signature. I estimate
17 that we may have the response to you **late next week.**"

18 32. The USDA did not provide the response "late next week."

19 33. Plaintiffs followed up with an email and phone call to the USDA on January 21,
20 2013:

21
22 "I left you a voice message today, but wanted to confirm:

23 We filed a FOIA request [sic] in October 2012. After months
24 of delays, you said on January 9 that you had completed your
25 review of our FOIA request and would have the documents to
26 us "late next week," i.e. by January 17 or 18 at the latest. It is
27 now January 21, and we have not received the documents or
28 an explanation for the continued delay.

As I said in my previous emails, we will file a lawsuit to compel
the release of the documents. I must insist that you provide

1 the documents to us by January 23, 2013 at 12:00 p.m. You
2 may email the response to our FOIA request to
3 daniel@edwardmisleh.com.”

4 34. The USDA did not respond.

5 35. On January 24, 2013, Plaintiffs wrote another email to Defendants:
6 “It's been three months since we requested the documents and
7 almost ten days since your own self-imposed deadline. I'm still
8 waiting on the documents or your explanation of why you're
9 withholding them.

10 Is this unnecessary delay a tactic FNS routinely uses to drive grocery
11 stores out of business, making their appeal moot?

12 This is getting ridiculous. If I don't hear from you tomorrow, I'm
13 going to file a lawsuit in U.S. District Court for the Eastern District
14 of California and ask the judge for an expedited briefing schedule to
15 compel you to release the documents.”

16 36. On January 25, 2013, the USDA responded that “Unfortunately, the appeal has
17 not been cleared for release and is still being reviewed.” The USDA stated that
18 “The person handling the appeal for signature is out of the office today and will
19 return on Monday.”

20 37. On Tuesday, January 29, 2013, the USDA emailed Plaintiffs: “I received a status
21 on your appeal and it is still being reviewed and waiting signature. We are
22 estimating to have the response to you by the end of next week.”

23 38. The USDA finally sent its response to the FOIA Appeal to Plaintiffs on January
24 30, 2013.

25 39. That response, attached to this Complaint as Exhibit D and incorporated herein
26 by reference, consisted of inappropriately redacted documents.

27 40. The response stated that it represented the exhaustion of Plaintiffs’ administrative
28 remedies, and, if Plaintiffs wished to appeal this determination, Plaintiffs would
have to file a federal lawsuit.

41. On February 11, 2013, Plaintiffs responded to the USDA in one last attempt to
avoid this lawsuit. That letter stated, in part:

1 “Your response consisted of almost nothing useful. Dozens
2 of pages of evidence remained redacted without explanation.
3 Again - you redacted evidence, not law enforcement
4 investigation techniques or other ‘secret’ information
5 describing those techniques, but the evidence your
6 investigators gathered to ‘prove’ that our clients engaged in
7 wrongful activity. Nothing in the FOIA exemptions allow
8 you to withhold such evidence.

9
10 Regardless of your failure to comply with the FOIA, I'm
11 writing to you to ask whether you will comply with a
12 subpoena issued by the administrative hearing officer
13 assigned to this case. If that officer issues a subpoena
14 ordering you to give us the unredacted documents pursuant
15 to her powers under the Administrative Procedures Act, 5
16 U.S.C. 556(c), will you comply with that subpoena? If you
17 won't, then we'd have to file a FOIA lawsuit. It would help us
18 to know in advance if you intend not to comply or not to
19 recognize the power of the administrative hearing officer to
20 issue a subpoena, so we can skip the charade and just file the
21 FOIA lawsuit.

22
23 Please respond as quickly as possible. Every week that this
24 continues unresolved is another week my clients suffer a loss
25 of 50% of their net income.

26
27 Thank you.”

28
42. Plaintiffs received no response to this email.

43. Plaintiffs asked the administrative hearing officer whether she would issue a
subpoena for the documents that had been withheld. The administrative hearing
officer replied in writing that she did not have the power to do so, nor would she
allow any other discovery to be propounded. The administrative hearing officer
stated that we would have to seek judicial review of the FOIA denial, and that the
officer would conduct her review of the SNAP appeal as soon as her caseload
would allow.

44. Plaintiffs’ administrative remedies have been exhausted with regard to their FOIA
request to the USDA. To enforce their rights to public information under FOIA,
injunctive relief is necessary to order the USDA to release the requested records.

Legal Background

45. In Public Law 110-175, § 2, Dec. 31, 2007, 121 Stat. 2524, Congress found that:

(1) The Freedom of Information Act was signed into law on July 4,

1966, because the American people believe that –

(A) our constitutional democracy, our system of self-government,

and our commitment to popular sovereignty depends upon the

consent of the governed;

(B) such consent is not meaningful unless it is informed consent;

and

(C) as Justice Black noted in his concurring opinion in *Barr v.*

Matteo (360 U.S. 564 (1959)), ‘The effective functioning of a free

government like ours depends largely on the force of an informed

public opinion. This calls for the widest possible understanding of

the quality of government service rendered by all elective or

appointed public officials or employees.’

(2) the American people firmly believe that our system of

government must itself be governed by a presumption of openness;

(3) the Freedom of Information Act establishes a ‘strong

presumption in favor of disclosure’ as noted by the United States

Supreme Court in *United States Department of State v. Ray* (502

U.S. 164 (1991)), a presumption that applies to all agencies

governed by that Act; [and]

(4) ‘disclosure, not secrecy, is the dominant objective of the Act,’ as

noted by the United States Supreme Court in *Department of Air*

Force v. Rose (425 U.S. 352 (1976)). Pub. L. No. 110-175, § 2, Dec.

31, 2007, 121 Stat. 2524.

46. Congress enacted FOIA in 1966 “ ‘to improve public access to information held

by government agencies.’ ” *Natural Resources Defense Council, Inc. v. U.S.*

1 *Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 496 (S.D.N.Y. 2008) (quoting *Pierce &*
 2 *Stevens Chem. Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d 1382,
 3 1384 (2d Cir. 1978)). The act “ ‘expresses a public policy in favor of disclosure so
 4 that the public might see what activities federal agencies are engaged in.’ ” *Id.*
 5 (quoting *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 143 (2d Cir. 1994)).
 6 FOIA is intended to “ensure an informed citizenry, vital to the functioning of a
 7 democratic society, needed to check against corruption and to hold the governors
 8 accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S.
 9 214, 242 (1978).

10 47. To this end, FOIA requires a federal agency to disclose records in its possession
 11 unless they fall under one of nine enumerated and exclusive exemptions. 5
 12 U.S.C. § 552(a)(3), (b); see also *Dep't of the Air Force v. Rose*, 425 U.S. 352,
 13 361 (1976).

14 48. The Freedom of Information Act provides that but for certain exceptions not
 15 applicable here:

16 “[E]ach agency, upon any request for records which (i) reasonably describes such
 17 records and (ii) is made in accordance with published rules stating the time, place,
 18 fees (if any), and procedures to be followed, shall make the records promptly
 19 available to any person.” 5 U.S.C. § 552(a)(3)(A) .

20 49. “Agency records” are materials that the agency either created or obtained and are
 21 in control of the agency at the time the FOIA request is made, and “control”
 22 means that “the materials came into the agency's possession in the legitimate
 23 conduct of its official duties.” *Or. Natural Desert Ass'n v. Gutierrez*, 409 F. Supp.
 24 2d 1237, 1243 (D. Or. 2006) (citing *United States Dep't of Justice v. Tax*
 25 *Analysts*, 492 U.S. 136, 145 (1989) for the proposition that “district court
 26 opinions and orders filed in civil tax cases and contained in the case files of the
 27 Department of Justice Tax Division were agency records under FOIA”).
 28

1 50. Furthermore, in responding to a FOIA request, the producing agency “shall
2 provide the record in any form or format requested by the person if the record is
3 readily reproducible by the agency in that form or format.” 5 U.S.C. §
4 552(a)(3)(B).

5 51. Under FOIA, “an agency shall make reasonable efforts to search for the records
6 in electronic form or format, except when such efforts would significantly
7 interfere with the operation of the agency's automated information system[,]” and
8 “the term “search” means to review, manually or by automated means, agency
9 records for the purpose of locating those records which are responsive to a
10 request.” Id. § 552(a)(3)(C)-(D).

11 52. Under the statute, the agency is required to respond to a FOIA request within 20
12 business days, excluding Saturdays, Sundays, and legal holidays. 5 U.S.C.
13 552(a)(6)(A)(i); see also 6 C.F.R. § 5.6(b). Failure to timely respond is itself a
14 violation of law. *Or. Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d at 1248
15 (holding that “an untimely response is a violation of FOIA, regardless of the final
16 outcome of the request”); *Gilmore v. United States Dep't of Energy*, 33 F. Supp.
17 2d 1184, 1188 (N.D. Cal. 1998) (same).

18 53. An agency shall not assess search fees... under this subparagraph if the agency
19 fails to comply with [the 20-workday time limit], if no unusual or exceptional
20 circumstances ... apply to the processing of the request. 5 U.S.C. §
21 552(a)(4)(A)(viii).

22 54. If a requesting party believes that the agency has improperly withheld all or part
23 of the responsive agency records within its control, or that the agency has failed to
24 respond to all aspects of its request, it must ordinarily file an administrative
25 appeal before it may bring an action in federal court. 5 U.S.C. § 552(a)(4)(B), (6);
26 6 C.F.R. § 5.9(a), (c).
27
28

1 55. However, if an agency fails to respond within the 20-workday time limits set forth
2 in 5 U.S.C. § 552(a)(6), a person making a FOIA request is deemed to have
3 exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(c)(i).

4 56. If the USDA does not respond to a FOIA appeal within 20 workdays, the FOIA
5 appellant has the right to file an action to enforce its FOIA rights in district court.
6 5 U.S.C. § 552(a)(6)(A)(ii).

7 57. FOIA places the burden of justifying a FOIA denial on the agency, not the
8 person who requests the records. 5 U.S.C. § 552(a)(4)(B). “The burden is on the
9 agency to demonstrate, not the requester to disprove, that the materials sought
10 are not ‘agency records’ or have not been ‘improperly withheld.’ ” *United States*
11 *Dept’t of Justice v. Tax Analysts*, 492 U.S. at 142 n.3.

12 58. The Freedom of Information Act provides: “The court may assess against the
13 United States reasonable attorney fees and other litigation costs reasonably
14 incurred in any case under this section in which the complainant has substantially
15 prevailed.” 5 U.S.C. § 552(a)(4)(E). For purposes of FOIA, a plaintiff has
16 substantially prevailed “if the complainant has obtained relief through either (I) a
17 judicial order, or an enforceable written agreement or consent decree; or (II) a
18 voluntary or unilateral change in position by the agency, if the complainant's claim
19 is not insubstantial.” *Id.* § 552(a)(4)(E)(ii)(I)-(II).

20 59. Moreover, FOIA provides that

21 Whenever the court orders the production of any agency
22 records improperly withheld from the complainant and
23 assesses against the United States reasonable attorney fees
24 and other litigation costs, and the court additionally issues a
25 written finding that the circumstances surrounding the
26 withholding raise questions whether agency personnel acted
27 arbitrarily or capriciously with respect to the withholding, the
28 Special Counsel shall promptly initiate a proceeding to
determine whether disciplinary action is warranted against
the officer or employee who was primarily responsible for
the withholding. The Special Counsel, after investigation and
consideration of the evidence submitted, shall submit his
findings and recommendations to the administrative
authority of the agency concerned and shall send copies of

1 the findings and recommendations to the officer or
2 employee or his representative. The administrative authority
3 shall take the corrective action that the Special Counsel
4 recommends. 5 U.S.C. § 552(a)(4)(F)(i).

5 **Count One**
6 **Failure to Timely Respond to Appeal in violation of Freedom of Information Act**
7 **(5 U.S.C. § 552, et. seq.)**

8 60. Plaintiffs hereby incorporate the preceding paragraphs as if fully restated herein.

9 61. Plaintiffs are entitled, under 5 U.S.C. § 552(a)(6)(A)(ii) and 6 C.F.R. § 5.6(b), to
10 receive a full response to their FOIA Appeal within 20 workdays of the request.

11 62. An agency is required to make a "determination" on the merits of a FOIA appeal
12 within 20 working days of receipt. 5 U.S.C. § 552(a)(6)(A)(ii). The agency must
13 "immediately notify the person making such request of the provisions for judicial
14 review of that determination." *Id.*

15 63. An agency may unilaterally extend the response deadline by up to 10 working days
16 in "unusual circumstances," but only upon giving written notice to the requester. 5
17 U.S.C. § 552(a)(6)(B)(i). This right may not be exercised if the agency has already
18 exceeded its 10 day response deadline for the initial request. *Id.*

19 64. FOIA requires any denial of a request to list the "names and titles or positions of
20 each person responsible for the denial." 5 U.S.C. § 552(a)(6)(C).

21 65. The USDA did not make a determination on the merits of Plaintiffs' FOIA appeal
22 within 20 working days of receipt.

23 66. The USDA exceeded its 10 day response deadline for the initial request, and was
24 therefore barred from extending its response deadline by up to 10 working days.

25 67. The USDA did not request an extension of time to respond to the FOIA Appeal
26 due to "unusual circumstances" pursuant to 5 U.S.C. § 552(a)(6)(B)(i) ("In unusual
27 circumstances ... the [20-day] time limit [] ... may be extended by written notice to
28 the person making such request setting forth the unusual circumstances for such

1 extension and the date on which a determination is expected to be dispatched.”);
2 see also 6 C.F.R. § 5.5(c).

3 68. The USDA did not request that Plaintiff modify or narrow its request, or agree to
4 an alternative time frame in which to process the request or appeal. See 5 U.S.C. §
5 552(a)(6)(B)(ii); see also 6 C.F.R. § 5.5(b).

6 69. From October 2012 until February 2013, USDA did not cite any of the nine
7 available FOIA exemptions to explain why it did not release any of the public
8 records responsive to the FOIA Appeal. 5 U.S.C. § 552(b)(1)-(9); see also 6 C.F.R.
9 § 5.6(c).

10 70. USDA’s failure to respond to the FOIA Appeal constitutes a denial of the FOIA
11 Request under 6 C.F.R. § 5.6(c).

12 71. Because USDA failed to produce any responsive agency records in its control
13 within the time limits provided by 5 U.S.C. § 552(a)(6), it may not charge any
14 search fees required to locate the agency records it has yet to produce in response
15 to the FOIA Appeal. 5 U.S.C. § 552(a)(4)(A)(viii).

16 72. Plaintiffs are entitled to injunctive and declaratory relief under 5 U.S.C. §
17 552(a)(4)(B) for Defendant’s failure timely to respond to Plaintiffs’ FOIA Request
18 and Plaintiffs’ Formal Appeal. *Or. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp.
19 2d at 1248 (holding that “an untimely response is a violation of FOIA, regardless of
20 the final outcome of the request”); *Gilmore v. United States Dep’t of Energy*, 33 F.
21 Supp. 2d at 1188 (same).

22 73. An actual controversy exists between the parties within the meaning of 28 U.S.C. §
23 2201. Thus, this Court may grant declaratory and injunctive relief pursuant to 28
24 U.S.C. §§ 2201 and 2202.

25 74. Granting the Plaintiffs’ request for relief will serve the public’s vital interests in the
26 effective administration of the SNAP benefits program because, among other
27 things, it will assist the Plaintiffs in restoring their ability to provide SNAP-eligible
28 food to their low-income customers. It will also allow Plaintiffs, and the public at

1 large, to evaluate the evidence to determine whether the SNAP participants are
2 truly engaged in trafficking, as the USDA claims.

3 75. Therefore, Plaintiffs are also entitled to their costs of suit and attorneys' fees under
4 both 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412.

5 **COUNT TWO**

6 **Unlawful Denial of FOIA Request and FOIA Appeal and Withholding of Public Records**
7 **in Violation of the Freedom of Information Act**
8 **(5 U.S.C. § 552, et. seq.)**

9 76. The preceding paragraphs are realleged and incorporated as if fully set forth herein.

10 77. On September 13, 2012, attorneys for Plaintiffs requested that the USDA produce
11 records relating to the USDA's revocation of Livingston Grocery's ability to
12 participate in the SNAP benefits program.

13 78. Under 5 U.S.C. § 552(a)(3)(A), the USDA is required to make any responsive
14 public records promptly available.

15 79. The USDA did not produce all responsive records, but instead withheld such
16 records.

17 80. Defendant has no valid legal basis to withhold the requested records, though
18 Defendant has asserted a "law enforcement" exemption as basis for its refusal to
19 release the responsive records within its control. 5 U.S.C. § 552 (a)(6)(A)(i), (b); see
20 also 6 C.F.R. § 5.5(b)(c).

21 81. Plaintiffs filed the Formal Appeal on October 19, 2012, but the Defendant did not
22 provide a determination within the 20 workdays provided by law.

23 82. Nevertheless, through repeated emails to Defendant, Plaintiffs managed to elicit a
24 response to the FOIA Appeal.

25 83. In the USDA's response to the FOIA Appeal, the USDA did not produce all
26 responsive records, but instead withheld such records.

27 84. Despite repeated requests for a response, the USDA (1) failed to provide the
28 required response within the time permitted by law, (2) failed to request an
extension of time for "unusual circumstances," (3) had not sought clarification of

1 the FOIA Request, (4) failed to provide any records responsive to the FOIA
2 Request during the statutory period, and (5) failed to provide an adequate legal
3 basis for withholding any responsive records.

4 85. “An agency seeking to withhold information under an exemption to FOIA has the
5 burden of proving that the information falls under the claimed exemption.” *GC*
6 *Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); see
7 also *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.1987).

8 86. The Freedom of Information Act indeed exempts from disclosure “records or
9 information compiled for law enforcement purposes” – but “only to the extent that
10 the production of such law enforcement records or information ... would disclose
11 techniques and procedures for law enforcement investigations or prosecutions, or
12 would disclose guidelines for law enforcement investigations or prosecutions if such
13 disclosure could reasonably be expected to risk circumvention of the law,” 5 U.S.C.
14 b(7)(E).

15 87. The USDA’s redactions are not necessary to protect against disclosure of law
16 enforcement “techniques and procedures.” At best, they would consist of evidence
17 gathered by the use of such techniques and procedures, but revealing evidence is
18 not the same as revealing the techniques used to gather that evidence. Because
19 challenging the government’s revocation of SNAP benefits requires access to the
20 government’s reasoning for that revocation, the reports must be released under
21 FOIA. *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 978-79 (9th Cir. 2009);
22 *Castaneda v. United States*, 757 F.2d 1010 (9th Cir. 1985).

23 88. The law enforcement exemption does not apply to the requested records because
24 they do not reveal techniques and procedures and will not impair the USDA’s
25 ability to conduct investigations.

26 89. Plaintiffs are entitled to injunctive relief under 5 U.S.C. § 552(a)(4)(B) to “enjoin
27 the agency from withholding agency records.”
28

1 90. An actual controversy exists between the parties within the meaning of 28 U.S.C. §
2 2201. Thus, this Court may grant declaratory and injunctive relief pursuant to 28
3 U.S.C. §§ 2201 and 2202.

4
5 **Count Three**
6 **Violation of the Administrative Procedures Act**

7 91. The preceding paragraphs are incorporated by reference as if fully restated herein.

8 92. Count Three is pled in the alternative to Counts One and Two.

9
10 93. The Administrative Procedure Act provides that an agency's action must be set
11 aside if it fails to meet statutory, procedural, or constitutional requirements or if it
12 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
13 with law. *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819 (10th Cir.
14 2000); 5 U.S.C. § 706(2)(A).

15 94. Where an administrative agency is empowered to make rules and regulations
16 necessary to carry out a statute, its arbitrary or capricious rules must be
17 overturned. 5 U.S.C. § 706(2)(A).

18
19 95. An agency rule is arbitrary and capricious if the agency relied on factors which
20 Congress has not intended it to consider, entirely failed to consider an important
21 aspect of the problem, or offered an explanation for its decision that runs counter
22 to the evidence before the agency or is so implausible that it could not be ascribed
23 to a difference in view or the product of agency expertise. *Motor Vehicle Mfgs.*
24 *Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

25 96. The USDA so flagrantly misapplied the FOIA exemptions – ignoring, for
26 example, the difference between (1) a law enforcement investigation “technique”
27 and (2) the evidence gathered by the *use* of that technique – that the USDA's act
28 of withholding public information was arbitrary and capricious, implausible, runs

1 counter to the evidence before the agency, and relies on factors Congress did not
2 intend the USDA to rely on.

3
4 97. Because the actions of the USDA were so flagrant as to be arbitrary and
5 capricious, this court should make a specific finding of that fact and refer the
6 matter to the Merit System Protection Board for investigation. 5 U.S.C. §
7 552(a)(4)(F).

8 98. An actual controversy exists between the parties within the meaning of 28 U.S.C. §
9 2201. Thus, this Court may grant declaratory and injunctive relief pursuant to 28
10 U.S.C. §§ 2201 and 2202.

11
12 **Prayer for Relief**

13 WHEREFORE, plaintiff prays that this Court:

- 14 1. Enter a declaratory judgment that the Defendant has violated the Freedom of
15 Information Act by failing to respond to the FOIA Request and Formal Appeal
16 within the time required by law;
- 17 2. Enter a declaratory judgment that the Defendant has violated the Freedom of
18 Information Act by denying, as specified above, the FOIA Request and Formal
19 Appeal without any reasonable basis in law;
- 20 3. Enter a declaratory judgment that the Defendant has acted arbitrarily and
21 capriciously in refusing to produce all records responsive to the FOIA Request
22 without any reasonable basis in law and in violation of FOIA and its own
23 regulations that implement FOIA;
- 24 4. Order Defendant to produce all records responsive to the FOIA Request within
25 20 days of issuance of the injunction at no cost to Plaintiffs;
- 26 5. In the alternative, to the extent that any records responsive to the FOIA Request
27 are withheld, in whole or in part, on the basis of privilege or other statutory
28 exemption, order Defendant to furnish such records to the Court for an in camera

1 inspection for the court's determination as to whether all or portions of such
2 records may be exempt from public disclosure pursuant to 5 U.S.C. §
3 552(a)(4)(B), and that, after such in camera inspection, the Court direct Defendant
4 to furnish to Plaintiffs a copy of such records, or all portions thereof subject to
5 permissive or mandatory disclosure;

6 6. Enjoin Defendant from charging any search fee to locate the agency records
7 responsive to the FOIA Request that it failed to produce within the time limit
8 imposed by 5 U.S.C. § 552(a)(6) (see 5 U.S.C. § 552(a)(4)(A)(viii));

9 7. Retain jurisdiction over this matter until such time as each of the Defendant has
10 fully complied with the requirements of FOIA;

11 8. Award the Plaintiffs their costs of litigation and attorneys' fees under FOIA, 5
12 U.S.C. § 552(a)(4)(E);

13 9. Award the Plaintiffs their costs and reasonable attorneys' fees and expenses
14 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

15 10. Enjoin the Defendant from relying on its invalid regulation or practice in all future
16 FOIA undertakings. *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983).

17 11. Find that the actions of the USDA were so flagrant as to be arbitrary and
18 capricious, and order the matter referred to the Merit System Protection Board
19 for investigation. 5 U.S.C. § 552(a)(4)(F).

20 12. Grant such other further relief, including injunctive relief, as the Court may deem
21 just and proper.

22
23 Respectfully submitted,

24
25 Dated: February 21, 2013

/s/Daniel Watts, Esq.

DANIEL WATTS SBN 277861

LAW OFFICE OF EDWARD MISLEH

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